

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD LEWIS HENRY,

Defendant-Appellant.

UNPUBLISHED
November 5, 2002

No. 233862
Antrim Circuit Court
LC No. 00-003435-FH

Before: Hood, P.J., and Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

A jury convicted defendant Ronald Henry of second-degree criminal sexual conduct¹ and he was sentenced to serve six to fifteen years in prison. Henry appeals as of right. We affirm.

I. Basic Facts And Procedural History

This case arises from the sexual assault of an eleven-year-old child. At trial, the child testified that on August 27, 2000, he left his home to visit a friend whom he hoped to find at the restaurant owned by the friend's parents. When the child arrived at the restaurant, he noticed Henry, a restaurant employee with whom the child was acquainted, sitting in a lawn chair near a shed located across the street. The child yelled to Henry, asking if he knew the whereabouts of his friend. Henry responded that the friend had gone elsewhere. As the child was preparing to leave, Henry asked that he come sit with him for a while. The child proceeded across the street where he sat with Henry outside the shed for several minutes before Henry asked him if he would like to borrow a movie. When the child responded that he would, Henry directed the child to accompany him inside the shed. Once the child was inside the shed, Henry told him to close the shed door. The child, however, did not close the door as asked, but rather stood inside the doorway, holding the door slightly ajar as Henry retrieved a box of movies from a shelf over a bed located inside the shed.² After Henry handed the child a movie from the box, the child turned to leave when Henry grabbed him by the arm then closed and locked the door using a latched device of a bent nail and hook. After locking the door, Henry kissed the child on the cheek while grabbing the boy's penis and remarking "how big it was." Frightened by Henry's conduct, the child hurriedly unlatched the door and ran from the shed, throwing the movie to the

¹ MCL 750.520c(1)(a).

² Apparently, Henry was living inside the shed while renovating his home.

ground as he left. When he returned home, the child informed his mother of what had happened before telephoning a family friend who was a local police officer.

Officer Jamie Peterson of the Elk Rapids Police Department testified that in responding to the child's complaint concerning the assault, he spoke with Henry who acknowledged that he had brushed against the boy's penis with his hand, but stated that he had done so accidentally while attempting to bring the box of movies down from the shelf, and that the child ran off before Henry had a chance to explain what had really "gone down."³ Although initially denying that the shed door was locked at the time of this incident, Henry later admitted to Officer Peterson that he had in fact locked the door while he and the child were inside.

Following closing arguments and jury instructions, the jury convicted Henry as stated above. At the sentencing hearing held in early April 2001, the trial court heard argument from both parties as well as the child's mother. In pleading for a lengthy sentence of incarceration, the child's mother indicated that, as a result of the fear her son harbored after being assaulted by Henry, she was forced to move from the community that she and her children both loved. She also stated that, since the incident, the child had attended counseling sessions every two weeks. However, the child remained terrified of what might happen when Henry is ultimately released. The child's mother pleaded with the trial court to consider how her son relives the incident every day.

The prosecutor also argued for a lengthy sentence and in doing so directed the trial court's attention to the presentence investigation report, which set forth the facts of a previous incident of criminal sexual conduct of which Henry had been charged but acquitted. According to the report, Henry was arrested and charged with first-degree criminal sexual conduct in 1989 after admitting to police that he had fondled and performed oral sex on a six-year-old boy, whose mother he had befriended. Although Henry did not deny these allegations at trial, he testified that he did not recall making these statements to police and that he was acquitted of the charges. In addition to the narrative in the presentence investigation report, the prosecutor provided the trial court with police reports pertaining to the earlier assault, as well as a transcript of Henry's testimony at the December 1990 trial on the charges stemming from that incident. Counsel for Henry offered no objection to admission of these documents.

After taking a brief recess to review the documents submitted by the prosecutor, the trial court returned to impose sentence. The trial court began by noting that "there is little question" that defendant's behavior here was pedophilic,⁴ a condition for which the court remarked there is no "truly effective treatment program." As such, the trial court found the most important sentencing goals here to be protection of the community and a proportionate punishment. The trial court further found that these goals necessitated a prison term outside the minimum range of twelve months to twenty-four months recommended by the statutory sentencing guidelines and that such a departure was warranted by case-specific factors not adequately accounted for by the guidelines. Specifically, the trial court found that the guidelines failed to account for the

³ Henry adhered to this version of events at sentencing, claiming the incident was simply a "misunderstanding."

⁴ In making this comment, the trial court noted that the child in question looked much younger than his actual age.

pedophilic nature of Henry's behavior in both this and the earlier offense of which he was acquitted.⁵ The trial court also found that, given the fact that the child's family was forced to move from the community as a result of his fear of Henry, the guidelines did not properly reflect the psychological consequences of Henry's conduct toward the child. As further justification for departure from the sentencing guidelines' recommended range, the trial court cited Henry's lack of remorse, as demonstrated by his refusal to acknowledge his deviant behavior, and the danger he presented to the community given his history of predatory pedophilic conduct. With these factors in mind, the trial court sentenced Henry to a minimum term of seventy-two months' imprisonment.

II. Departure From The Sentencing Range

A. Standard Of Review

Henry argues that the trial court erred in departing from the sentencing range recommended by the statutory sentencing guidelines. Because defendant challenges neither the veracity nor the objective and verifiable nature of the factors cited by the trial court, this Court's review is limited to determining whether the trial court abused its discretion in concluding that the stated factors constituted substantial and compelling reasons for departure from the guidelines.⁶

B. The Legislative Sentencing Guidelines

The legislative sentencing guidelines require the trial court to impose a minimum sentence in accordance with the calculated guidelines range.⁷ However, a trial court may depart from the recommended sentencing range if it has a substantial and compelling reason and states this reason on the record.⁸ To constitute a substantial and compelling reason for departing from the guidelines, the reason must be objective and verifiable, and must irresistibly hold the attention of the court.⁹ A court may not, however, base a departure on an offense or offender characteristic already considered by the guidelines, unless it concludes that the guidelines provided inadequate or disproportionate weight to that factor, given the facts of the case.¹⁰

Here, the applicable statutory sentencing guidelines recommended a minimum range of twelve to twenty-four months in prison. The trial court, however, found that substantial and compelling reasons warranted a departure from this range, and sentenced Henry to a minimum term of seventy-two months in prison. As we noted above, as justification for this upward departure the trial court cited, among other things, the pedophilic nature of Henry's predatory

⁵ With respect to the veracity of the allegations in the previous case, the trial court noted that there is obviously "no question in [that victim's] mind that the behavior occurred," as the victim in that case attended the entire trial on the instant charge.

⁶ *People v Babcock*, 244 Mich App 64, 76; 624 NW2d 479 (2000).

⁷ MCL 769.34(2).

⁸ MCL 769.34(3); *Babcock*, *supra*.

⁹ *Babcock*, *supra* at 75.

¹⁰ MCL 769.34(3)(b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

behavior, the severe psychological impact of that conduct on the child, and the fact that Henry had previously been charged, although acquitted, with sexually assaulting another young boy. On appeal, Henry challenges the trial court's reliance on these factors to depart from the sentencing guidelines' recommended range, arguing that the predatory nature of his conduct and the psychological harm suffered by the child were factors already accounted for by the guidelines, and that consideration of the facts surrounding his prior acquittal was inappropriate because he was not afforded an opportunity to challenge the accuracy of those facts.

Henry is correct that the guidelines account for predatory behavior in OV 10,¹¹ and for the psychological harm to the victim in OV 4.¹² However, in finding that these factors warranted a departure from the guidelines' recommended range, the trial court reasoned that neither the pedophilic nature of Henry's predatory behavior nor the severe psychological impact of that conduct on the child were given adequate consideration by the guidelines. We find no error in the trial court's decision in this regard. Indeed, nothing in OV 10, or for that matter any other offense variable applicable to the crime at issue here, accounts for the pedophilic nature of Henry's conduct in this or his previous offense. Moreover, while OV 4 permits assessing up to ten points to account for "[s]erious psychological injury to [the] victim requiring professional treatment," we agree with the trial court that the variable does not adequately account for psychological trauma so great it ultimately forces the child's family to move from the community, as happened here.

As for the trial court's consideration of the facts surrounding Henry's previous acquittal, Henry concedes that such consideration is permissible, but argues that he was not afforded an opportunity to challenge the accuracy of the facts on which the trial court relied, as required by *People v Ewing (After Remand)*.¹³ Contrary to Henry's assertion, however, the trial court afforded him such an opportunity at sentencing when it asked whether there were any challenges to the factual statements contained in the presentence investigation report, which properly included a narrative of the allegations underlying the charge of which defendant was acquitted.¹⁴ Review of the sentencing hearing transcript indicates that Henry extensively reviewed the report before the hearing and was therefore aware that this narrative had been included within the report and would likely be an issue at sentencing. Henry was also permitted to view the police reports and trial transcripts pertaining to the earlier charge, which involved allegations that he performed oral sex on a six-year-old boy, before the prosecutor submitted those to the trial court, but again offered no objection. In light of these facts, Henry's claim that he was not afforded an opportunity to contest the facts relied on by the trial court is without merit.¹⁵ Accordingly, we

¹¹ MCL 777.40.

¹² MCL 777.34.

¹³ *People v Ewing (After Remand)*, 435 Mich 443; 458 NW2d 880 (1990).

¹⁴ *People v Potrafka*, 140 Mich App 749, 752; 366 NW2d 35 (1985).

¹⁵ To the extent Henry argues that defense counsel was ineffective in failing to challenge these facts at sentencing, his failure even to assert that such facts were inaccurate or otherwise unreliable belies any notion of prejudice resulting from this alleged deficiency. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Accordingly, we reject Henry's claim that he was denied the effective assistance of counsel as a result of defense counsel's failure to raise this issue below.

find that the trial court did not err in considering the challenged factors for purposes of an upward departure from the guidelines' recommended sentencing range.

We further conclude that the trial court properly determined that these factors, when considered in connection with Henry's lack of remorse, justified an upward departure. As previously noted, the severe psychological trauma suffered by the child and the fact that Henry has a history of predatory pedophilic behavior that he refuses to acknowledge are factors that the guidelines do not adequately consider. Given these facts, adequate protection of society and a proportionate punishment warrant a departure from the minimum range recommended by the guidelines. Accordingly, we conclude that the trial court did not abuse its discretion in finding substantial and compelling reasons for departing from the guidelines.¹⁶

C. Proportionality

Henry argues that, considering the circumstances of the offense as well as his age and lack of any prior convictions, his minimum sentence of seventy-two months, which is three times that recommended by the sentencing guidelines, is disproportionate. The Michigan Supreme Court has recently suggested that, even where a reviewing court concludes that the trial court had substantial and compelling reasons to deviate from the guidelines' recommended range, a reviewing court may still consider whether the particular departure from the guidelines' range was proportionate.¹⁷ The key test of the proportionality of a sentence is whether it reflects the seriousness of the matter, as demonstrated by the circumstances surrounding the offense and the offender.¹⁸

Here, in challenging the proportionality of his sentence Henry attempts to minimize the seriousness of this matter by describing himself as a forty-eight-year-old male with no prior convictions, who has been convicted of "momentarily groping" and kissing the child. However, we observe that such a characterization of the circumstances presented here is too simplistic, as it ignores that the child was a young boy whom Henry enticed into a locked and confined area in order to commit this crime more easily and privately. Henry's characterization of his criminal history is also somewhat simplistic. As previously noted, although not convicted, Henry had been previously tried on charges involving allegations of a more severe sexual assault on an even younger child. As stated by the trial court, these circumstances, when viewed in conjunction with Henry's refusal to acknowledge his deviant behavior, warranted a lengthy term of incarceration both as punishment for Henry's predatory and pedophilic behavior and a means to protect the community. Accordingly, we find that Henry's sentence properly reflects the seriousness of the circumstances surrounding the offense and the offender, and is therefore proportionate.¹⁹

¹⁶ *Babcock, supra*.

¹⁷ See *People v Hegwood*, 465 Mich 432, 437, n 10; 636 NW2d 127 (2001).

¹⁸ *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

¹⁹ *Milbourn, supra*.

III. Scoring

A. Standard Of Review

Henry argues that the trial court erred in scoring fifteen points for OV 8, which requires that the victim be “asported to another place of greater danger or to a situation of greater danger,” or be “held captive beyond the time necessary to commit the offense.”²⁰ In determining whether the trial court properly construed and applied the sentencing guidelines, review de novo is appropriate.²¹ However, to the extent that the trial court had to make factual findings in applying the guidelines, our review must show some deference to those findings, which requires the clear error standard of review.²²

B. The Trial Court’s Application Of The Sentencing Guidelines

Here, the evidence showed that Henry enticed the child into an enclosed storage shed under the guise of selecting a movie to borrow. Clearly, the confined and private environment inside the storage shed was a place of greater danger than the outdoor area where the two had first been talking.²³ Moreover, although Henry did not forcibly or otherwise physically move the child into the shed, the evidence supports that Henry instigated the movement for the calculated purpose of concealing his intended actions. Under these circumstances, we conclude that the trial court did not err in scoring OV 8 at fifteen points.²⁴

We affirm.

/s/ Harold Hood
/s/ William C. Whitbeck
/s/ Peter D. O’Connell

²⁰ MCL 777.38(1)(a).

²¹ See *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002).

²² See MCR 2.613(C); see, generally, *People v Leversee*, 243 Mich App 337, 348-349; 622 NW2d 325 (2000).

²³ See, e.g., *People v Hack*, 219 Mich App 299, 313; 556 NW2d 187 (1996) (moving a victim to a different room away from the watchful eye of other persons supported finding that the victim was moved to a place of greater danger for analogous offense variable under judicial sentencing guidelines).

²⁴ *Id.*